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DAILY NEWS

In Latest EPA Legal Defeat, D.C. Circuit Vacates Key Parts Of Coal Ash Rule

August 21, 2018

A federal appeals court has vacated major parts of the Obama-era coal ash disposal rule for being too lenient and is ordering the Trump administration to craft stricter disposal mandates for certain sites that could require hundreds of them to either shutter or install new liners, the latest in a growing series of significant legal defeats for the agency.

In an Aug. 21 *per curiam* opinion, a three-judge panel of the U.S. Court of Appeals for the District of Columbia Circuit broadly backs environmentalists' arguments that the 2014 Resource Conservation and Recovery Act (RCRA) rule does not go far enough to regulate sites that lack a composite liner to prevent groundwater leaks, or to address potential pollution from closed "legacy sites."

The decision, by the panel of Judges Karen LeCraft Henderson, Nina Pillard and Patricia Ann Millett, also rejects the power industry claims that the rule is unlawfully strict.

"It is inadequate under RCRA for the EPA to conclude that a major category of impoundments that the agency's own data show are prone to leak pose 'no reasonable probability of adverse effects on health or the environment,' simply because they do not already leak," reads the decision.

The decision in *Utility Solid Waste Activities Group (USWAG), et al., v. EPA, et al.,* strikes down as arbitrary and capricious the agency's decision not to require upgrades or shutdowns at ash disposal sites that either lack a composite liner or are located at closed power plants unless a leak is detected -- a strategy the panel describes as giving the sites "one free leak."

"[T]he EPA did not explain how the Rule's contemplated detection and response could assure 'no reasonable probability of adverse effects to health or the environment'" as RCRA requires, the panel says.

Tightening the rule's treatment of unlined, clay-lined and legacy sites will require hundreds of disposal sites to shut down or undertake costly retrofits to prevent new leaks. The D.C. Circuit panel writes that of 735 coal ash impoundments known to EPA, only 504 sites have data available on their liner technology, and only 17 percent of those -- about 85 -- use the composite liners that the agency found to be the only "effective" method of reducing leaks.

The ruling in *USWAG* represents the latest in a string of major court losses for EPA and the Trump administration overall on environmental issues in recent weeks. Those include another D.C. Circuit decision that struck down the stay of an Obama-era facility safety rule, the 9th Circuit's reversal of former agency Administrator Scott Pruitt's decision not to ban the pesticide chlorpyrifos, and a federal district court decision in South Carolina reviving the 2015 Clean Water Act jurisdiction rule that Pruitt had stayed.

While the RCRA ash rule at issue in *USWAG* was crafted by the Obama administration, the panel's decision sets new limits on how far the Trump EPA can go in its ongoing process of rewriting the rule. The agency is using a multi-step rulemaking process to add flexibility for state permit-writers but faces claims from environmentalists that it is unlawfully weakening the standards for preventing ash leaks.

Environmentalists' Claims

In backing the environmentalists' arguments on unlined, clay-lined and legacy sites, the D.C. Circuit panel largely relies on EPA's own administrative record for the rule, under which the agency regulated coal ash as a solid waste subject to RCRA subtitle D requirements rather than the hazardous waste subtitle C mandates environmentalists sought and said would be more protective.

The judges hold that the agency's data showed that the facilities are likely to leak, and that ash leaks pose serious risks to health and the environment. The agency failed to raise any firm policy justification for not addressing those threats, the judges say.

Moreover, they say EPA never assessed in its rulemaking process the likely environmental or health harms that would result from waiting until a leak is detected to begin work on repairing, retrofitting or closing a site -- especially since, the opinion continues, there is no guarantee a leak will be detected immediately.

"In defending the Rule as compliant with RCRA, the EPA did not even consider harms during the retrofit or closure process. . . . [T]he EPA has failed to show how unstaunched leakage while a response is pending comports with the 'no reasonable probability' standard," the decision says.

Similarly, the judges write that EPA's justification for not addressing legacy sites directly -- that it would be impractical to identify the current owners of closed power plants -- "does not hold water."

"The record shows that the EPA knows where existing legacy ponds are and, with that and other information, the EPA already is aware of or can feasibly identify the responsible parties," the decision says.

The only claim by environmentalists that the panel overtly rejects is an argument that the rule does not go far enough to require site operators to give public notice of leaks and other RCRA violations at their facilities -- a claim that the judges say was never raised in public comments.

"Having stood silent during the rulemaking, the Environmental Petitioners may not now raise their complaints for the first time in their petition for judicial review," the decision says.

Industry Claims

While USWAG and its industry allies greatly scaled back their court arguments against the RCRA rule after the Trump administration took office and agreed to reconsider the policy, they continued to argue that EPA lacks authority to regulate any ash site where disposal is not ongoing, including both legacy sites and inactive sites at active power plants -- a claim the D.C. Circuit rejects.

The judges say there is no merit to industry groups' claim that the language of RCRA, which applies to sites where waste "is disposed of," restricts EPA regulations to facilities with active disposal operations. Rather, they say, the wording "clearly" applies to any facility that stores disposed waste.

"Think of it this way: If a kindergarten teacher tells her students that they must clean up any drink that 'is spilled' in the room, that would most logically be understood to mean that a student must clean up her spilled drink even if the spill is already completed and nothing more is leaking out of the carton. A student who refused to clean up that completed spill (as Industry Petitioners would have it) might well find himself on time out," the panel writes.

In a partial concurrence, Henderson says that she agrees with EPA's reading of the law but disagrees with the rest of the panel only on the question of whether the "is disposed of" wording is clear -- rather, she says, the law is ambiguous and the agency's interpretation is permissible under the doctrine of *Chevron* deference.

However, the panel unanimously rejects a separate industry argument that EPA was wrong to refuse to add cost considerations to the test for when a facility qualifies for the "alternative" closure process that extends the deadline to shut down if there is no other site where a power plant can send its waste.

"Under any reasonable reading of RCRA, there is no textual commitment of authority to the EPA to consider costs in the open-dump standards," the panel says, adding that the law lacks even a "flexible" mandate that could be construed as allowing cost considerations, such as the Clean Air Act's use of "appropriate and necessary" that the Supreme Court said covers costs in the 2015 decision *Michigan v. EPA* that dealt with the rule governing power plants' mercury emissions. -- *David LaRoss* (dlaross@iwpnews.com)

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